

Introduction

For more than two decades, the United States has been seeking to deter and prevent the bribery of foreign public officials in international business. This corrupt practice has many pernicious effects. It penalizes companies that try to compete fairly and win contracts through the quality and price of their products and services. It tarnishes the reputation of the companies engaging in bribery. And it undermines good governance, retards economic development, and distorts trade in countries whose public officials are bribed.

In 1997, the United States achieved a major step forward in building an international coalition to address the problem when thirty-four exporting countries, including the United States, negotiated the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions within the Organization for Economic Cooperation and Development (OECD).

The Clinton Administration and the Congress subsequently worked together in 1998 to enact the International Anti-Bribery and Fair Competition Act (IAFCA), which amended certain provisions of the Securities Exchange Act of 1934 and the Foreign Corrupt Practices Act of 1977 (FCPA) that relate to the bribery of foreign public officials. These changes were made to implement the Convention. The United States ratified the Convention on November 20, 1998, and officially deposited its instrument of ratification with the OECD on December

8, 1998. The Convention entered into force on February 15, 1999.

While the main focus of the IAFCA is on implementation of the OECD Convention, the Act also addresses Congressional concerns regarding privileges and immunities for international organizations providing satellite communications services that may affect fair competition in that industry. A review of these issues is contained in Chapter 10.

U.S. Leadership on the Convention

The United States launched its own campaign against international corrupt business practices more than twenty years ago with passage of the FCPA. The law established substantial penalties for persons making payments to foreign officials, political parties, party officials, and candidates for political office to obtain or retain business. Enactment of the legislation reflected deep concern among a broad spectrum of the American public about the involvement of U.S. companies in unethical business practices. Disclosures in the mid-1970s indicated that U.S. companies spent millions of dollars to bribe foreign public officials and thereby gain unfair advantages in competing for major commercial contracts.

The FCPA has had a major impact on how U.S. companies conduct international business. However, in the

absence of similar legal prohibitions by key trading partners, U.S. businesses were put at a significant disadvantage in international commerce. Their foreign competitors continued to pay bribes without fear of penalties, resulting in billions of dollars in lost sales to U.S. exporters.

Recognizing that bribery and corruption in foreign commerce could be effectively addressed only through strong international cooperation, the United States undertook a long-term effort to convince the leading industrial nations to join it in passing laws to criminalize the bribery of foreign public officials. The Omnibus Trade and Competitiveness Act of 1988 reaffirmed this goal, calling on the U.S. government to negotiate an agreement in the OECD on the prohibition of overseas bribes. After nearly ten years, the effort succeeded. On November 21, 1997, the United States and thirty-three other nations adopted the Convention. It was signed on December 17, 1997. All signatories to the Convention also agreed to implement the OECD's recommendation on eliminating the tax deductibility of bribes.

The Convention entered into force on February 15, 1999. As of June 10, 2000, twenty-one countries have deposited an instrument of ratification with the OECD. We are urging all signatories that have not acted to conclude their internal processes as soon as possible and deposit an instrument of ratification.

Major Provisions of the Convention

The Convention obligates the parties to criminalize bribery of foreign public officials in the conduct of international business. It is aimed at proscribing the activities of those who offer, promise, or pay a bribe. For this reason, the Convention is often characterized as a "supply side" agreement, as it seeks to effect changes in the conduct of companies in exporting nations.

The definition of "foreign public official" covers many individuals exercising public functions, including officials of public international organizations. It also captures business-related bribes to such officials made through intermediaries and bribes that corrupt officials direct to third parties. The Convention further requires that the parties, among other things:

- Apply "effective, proportionate, and dissuasive criminal penalties" to those who bribe, and provide for the ability to seize or confiscate the bribe and bribe proceeds (i.e., net profit) or property of similar value, or to apply monetary sanctions of comparable effect.
- Establish criminal liability of legal persons (e.g., corporations) for bribery, where consistent with a

country's legal system, or alternatively, ensure that legal persons are subject to effective, proportionate, and dissuasive noncriminal sanctions, including monetary penalties.

- Make bribery of a foreign public official a predicate offense for purposes of money laundering legislation on the same terms as bribery of domestic public officials.
- Take necessary measures regarding accounting practices to prohibit the establishment of off-the-books accounts and similar practices for the purpose of bribing or hiding the bribery of foreign public officials.
- Provide mutual legal assistance to the fullest extent possible under their respective laws for the purpose of criminal investigations and proceedings under the Convention and make bribery of foreign public officials an extraditable offense.

The Convention tracks the FCPA closely in many important respects. Unlike the FCPA, however, it does not cover bribes to political parties, party officials, and candidates for public office. The United States has urged that the Convention be strengthened by including these individuals and organizations in the definition of foreign public official.

Reporting and Monitoring Requirements

Section 6 of the IAFCA provides that not later than July 1, 1999, and July 1 of each of the five succeeding years, the Secretary of Commerce shall submit to the House of Representatives and the Senate a report on implementation of the Convention by other signatories and on certain matters relating to international satellite organizations addressed in the IAFCA. The IAFCA requests information in the following areas related to the Convention and antibribery issues:

- The status of ratification and/or entry into force for signatory countries.
- A description of domestic implementing legislation and an assessment of the compatibility of those laws with the Convention.
- An assessment of the measures taken by each party to fulfill its obligations under the Convention, including an assessment of the enforcement of the legislation implementing the Convention; efforts to promote public awareness of those laws; and the effectiveness, transparency, and viability of the monitoring process for the Convention, including its inclusion of input from the private sector and nongovernmental organizations.

- An explanation of the laws enacted by each signatory to prohibit the tax deduction of bribes.
- A description of efforts to add new signatories and to ensure that all countries that become members of the OECD are also parties to the Convention.
- An assessment of the status of efforts to strengthen the Convention by extending its prohibitions to cover bribes to political parties, party officials, and candidates for political office.
- An assessment of antibribery programs and transparency with respect to certain international organizations.
- A description of the steps taken to ensure full involvement of U.S. private sector participants and representatives of nongovernmental organizations in the monitoring and implementation of the Convention.
- A list of additional means for enlarging the scope of the Convention and otherwise increasing its effectiveness.

In addition, the IAFCA requests the following information with regard to international satellite organizations:

- A list of advantages, in terms of immunities, market access, or otherwise, in the countries or regions served by certain international satellite organizations; the reason for such advantages; and an assessment of progress toward fulfilling the policy described in Section 5 of the IAFCA.

The 2000 report to Congress addresses all the areas specified in Section 6 of the IAFCA. It updates information contained in the 1999 report and provides entirely new information in several areas. Of particular note, this year's report assesses the national legislation of nine additional parties, bringing the total number of foreign countries reviewed to twenty. Future reports are expected to provide more extensive information as other signatory countries bring the Convention into effect and we learn more about how countries are enforcing their antibribery laws.

The Senate, in its July 31, 1998, resolution giving advice and consent to ratification of the Convention, requested that the President submit a similar report on enforcement and monitoring of the Convention to the Senate Committee on Foreign Relations and the Speaker of the House of Representatives. The President delegated responsibility for this report to the Secretary of State. In light of the similarity of the reporting requirements, the Commerce and State Departments have worked together, in close coordination with the Justice and Treasury Departments, the Office of the United States Trade Representative, and the staff of the United States Securities and Exchange Commission, to prepare the two reports.

The Monitoring Effort

The U.S. government has established a program to monitor implementation of the Convention and encourage effective action against bribery and corruption by trading partners around the world. This effort includes regular contacts with the business community and nongovernmental organizations, dissemination of information about the Convention and antibribery legislation over the Internet, and other initiatives to promote international cooperation in combating these illicit and harmful practices. Preparation of the annual reports to Congress under the IAFCA has been fully integrated into the United States' internal monitoring process. More detailed information on monitoring is provided in Chapter 3.

In addition to the U.S. government monitoring, U.S. officials are also taking part in the OECD process for monitoring implementation of the Convention. The OECD Working Group on Bribery is conducting a systematic review of measures taken by signatory countries to carry out their obligations under the Convention. In the first phase of this review, the Working Group is examining national implementing legislation to assess whether it conforms to the requirements of the Convention. In the second phase, the Working Group will conduct on-site visits to assess steps that parties are taking to enforce their antibribery legislation and fulfill other obligations under the Convention.

Thus far, we have been encouraged by the seriousness with which other signatories are approaching the first phase of the OECD review and by the concrete steps many have taken to make bribery of foreign public officials illegal under their domestic laws. However, we are concerned about the adequacy of several countries' implementing legislation and their apparent failure to meet all the standards of the Convention. Chapter 2 provides a more detailed U.S. government analysis of national implementing legislation of twenty signatories and reviews specific areas of concern. We believe that the OECD's process of peer review will be effective in encouraging signatories to bring their implementing legislation into conformity with the Convention. All signatories have an interest in ensuring that all parties enact effective implementing legislation and fulfill their obligations under the Convention. But achieving this goal will require the active engagement and close cooperation of signatory governments, the private sector, and nongovernmental organizations.

Long-Term Commitment to Fighting Bribery and Achieving Fair Competition

After more than twenty years of effort, the United States is making real progress in building an international coalition to fight bribery and level the playing field for businesses to compete in the global marketplace. There is now greater recognition of the damaging effects of bribery in international business transactions and a broader consensus on the need to take corrective action. Adoption of the Convention by thirty-four countries represents an important and historic achievement.

However, much work remains to be done in order to ensure that the Convention becomes an effective instrument for eliminating bribery in international commerce. Only in the past year have the majority of signatories taken steps to bring their laws into conformity with the Convention. Thirteen countries have yet to complete their internal legislative process and deposit instruments of ratification with the OECD. Furthermore, most Convention signatories have had no experience in enforcing international antibribery laws. Many foreign companies are only beginning to adjust their internal policies to the new international legal standards on bribery. Achieving the goals of the Convention, therefore, will take time.

In addition to supporting the OECD Convention, the United States has undertaken a variety of other international initiatives to combat bribery and corruption and to promote good governance and business integrity. Under the leadership of Vice President Al Gore, the United States has sought to help develop model approaches for upholding integrity among justice and security officials, particularly police, prosecutors, judges, and military personnel. In February 1999, Vice President Gore chaired a global forum in Washington at which representatives of ninety countries exchanged experiences on fighting corruption and discussed ways to promote good governance. In light of the success of the first global forum, the Vice President offered to have the United States cosponsor a second conference with the Netherlands in The Hague on May 28–31, 2001.

The United States is also actively supporting more focused initiatives to address unique problems in specific regions.

- In Central and Southeast Europe, the United States has helped to launch several important anticorruption programs in the Organization for Security and Cooperation in Europe, the Southeast Europe Cooperation Initiative (SECI), and the Stability Pact forum. The United States played a key role in estab-

lishing the SECI Law Enforcement Cooperation Center in Bucharest and promoting the new Stability Pact Anticorruption Initiative that will bring the United States, the European Union, and countries of the region together in a common effort to combat public corruption.

- Building on discussions at the first global forum in Washington, a number of African countries under the auspices of the Global Coalition for Africa are expected to approve a declaration of anticorruption principles. Ministers of eleven African nations have already endorsed the declaration.

- The Asia–Pacific Economic Cooperation forum (APEC), in which the United States plays an active role, has begun to address anticorruption issues in the context of its work on investment promotion, economic governance, public sector management, and the international financial system. The challenges of corruption and the need for measures to prevent or control it figured prominently in the APEC Investment Symposium and Asia-Pacific Ministerial on Organized Crime, which were held in March 2000.

The United States is encouraging anticorruption and good governance initiatives in many different public international organizations, including the major international financial institutions (e.g., the World Bank and International Monetary Fund), the Organization of American States, the United Nations, and the World Trade Organization. A review of initiatives and policies of several organizations that are playing a particularly important international role in fighting corruption is provided in Chapter 7. In addition to outreach activities, where appropriate, the United States encourages all international organizations to maintain high standards of ethics, transparency, and good business practices in their internal operations and the projects they administer.

Combating international bribery and corruption will require a long-term effort on many fronts to succeed. The Clinton Administration is committed to pursuing this effort vigorously in close contact with Congress, the business community, and interested nongovernmental organizations.